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No. 02-1452

In The

Supreme Court of the United States

CITY OF CINCINNATI,

Petitioner,

v.

PATRICIA JOHNSON and MICHAEL AU FRANCE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Respondents Patricia Johnson and Michael Au France, Plaintiffs below, submit this Opposition Brief in response to the Petition for a Writ of Certiorari filed by the City of Cincinnati.

Most importantly, there are dispositive jurisdictional reasons for denying *certiorari*. During the pendency of the Sixth Circuit appeal below, the Ohio Supreme Court invalidated the drug exclusion ordinance at issue in this case in a separate proceeding, *State v. Burnett,* 755 N.E.2d 857 (2001), *cert. denied*, 535 U.S. 1034 (2002). Because the Ohio Supreme Court's ruling rested on independent and adequate state law grounds, the ordinance will remain unenforceable regardless of what this Court decides, and any opinion by this Court discussing the federal constitutional claims presented by the petition would be purely advisory. For this reason alone, *certiorari* should be denied.

In addition, none of the many constitutional claims that Petitioner seeks to raise before this Court merit plenary review. Petitioner's principle complaint is that the court below improperly looked beyond the Fourth Amendment when it analyzed the constitutionality of the challenged ordinance, which permitted city officials to bar anyone arrested or convicted of a drug offense within a designated "drug exclusion zone" from reentering that zone for 90 days (after an arrest) or one year (after a conviction).

As described more fully below, the Sixth Circuit ruling is consistent with this Court's prior holdings and does not create any meaningful conflict with the holdings of other

circuits. For this reason, as well, *certiorari* should be denied.

STATEMENT OF THE CASE

This case concerns the constitutionality of a municipal ordinance enacted by the City of Cincinnati in 1996, which created a so-called "drug-exclusion zone" in an area of the city known as "Over-the-Rhine." Under the terms of the ordinance, Chapter 755 of the City's Municipal Code, a person arrested for a drug offense in Over-the-Rhine could be barred from re-entering the neighborhood for 90 days.[1] A person convicted of a drug offense in Over-the-Rhine could be barred from entering the neighborhood for one year. Any violation of an exclusion order subjected the violator to prosecution for criminal trespass.[2]

In 1998, Respondent Patricia Johnson was arrested but never indicted for a marijuana trafficking offense in Over-the-Rhine. As a result of her arrest, she was barred for 90 days from entering the neighborhood where one of her children and five of her grandchildren resided. Respondent Michael Au France is a homeless man who was ultimately barred from entering Over-the Rhine for approximately four years. Because of his exclusion, he could neither visit his attorney's office nor seek shelter

[1] A 1998 amendment to the ordinance clarified that the 90 day exclusion would end upon acquittal, dismissal of charges, or failure to prosecute.

[2] The ordinance provided an exception for individuals who lived or worked in the drug-exclusion zone prior to receiving an exclusion order.

from social service organizations located in the neighborhood.

Respondents brought this lawsuit to challenge the constitutionality of the exclusion ordinance. Both the district court [Pet. App. 71-102] and the court of appeals [Pet. App. 1-70] agreed that the ordinance could not be sustained under the federal constitution.

However, before even reaching the federal constitutional questions, the Sixth Circuit noted that the ordinance had also been struck down by the Ohio Supreme Court on state law grounds following the district court's decision in this case. The Sixth Circuit properly recognized that this state law ruling by the Ohio Supreme Court is binding on the federal courts. [Pet. App. 7-9].[3]

REASONS FOR DENYING THE WRIT

The requested Writ should be denied for two reasons. First, because the decision of the Ohio Supreme Court in *Burnett* creates a fatal jurisdictional defect which precludes review by this Court. Second, because even in the absence of that defect, nothing in the opinion below conflicts with the holdings of this Court, or creates a conflict among the circuits, meriting plenary review.

[3] As the Sixth Circuit also properly recognized, the parties to this case nonetheless have an ongoing case or controversy regarding attorney's fees, [Pet. App. 8-9], but the resolution of that dispute neither requires nor warrants this Court's present intervention.

I. THE OHIO SUPREME COURT HOLDING IN *STATE v. BURNETT* INVALIDATED CHAPTER 755 ON INDEPENDENT AND ADEQUATE STATE LAW GROUNDS, THUS PRECLUDING REVIEW BY THIS COURT.

This Court does not review judgments that rest on independent and adequate state law grounds. Nor can the Court render advisory opinions on federal issues when the challenged ordinance has been struck down on state law grounds by an intervening state court decision. *See generally, Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997). That is precisely the situation here.

In October 2001, in *State v. Burnett, supra,* the Ohio Supreme Court struck down Chapter 755 as a violation of both state law and the state constitution. The court held that Chapter 755 exceeded the authority granted to cities under Section 3, Article XVIII of the Ohio Constitution. *Id.* at 868. The court further ruled that Chapter 755 conflicted with the Ohio Revised Code by adding a punishment (banishment) not authorized by state statute. *Id.*[4]

As a result of *Burnett,* Chapter 755 is now unenforceable as a matter of state law. A ruling by this Court on the federal constitutional questions presented in the petition for *certiorari* would, therefore, have no practical impact on the future enforcement of the ordinance. Under these

[4] The Ohio Supreme Court also found that Chapter 755 violates the federal constitution, but there is no doubt that its state law rulings provided an entirely independent and adequate basis for invalidating the ordinance.

circumstances, there is no jurisdiction in this Court, and the petition for *certiorari* must be denied for reasons that this Court has frequently explained.

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its view of federal laws, our review would amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. at 125-26. *See also Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977); *Ridgway v. Ridgway*, 454 U.S. 46 (1981); *Michigan v. Long*, 463 U.S. 1032 (1983).

Here, of course, Petitioner is not seeking direct review of the Ohio Supreme Court's state law decision but the principle remains the same. Nothing the Sixth Circuit did, and nothing that this Court can do, will alter the effect of the Ohio Supreme Court's judgment, or resuscitate Chapter 755. Any ruling from this Court on the validity of that ordinance would thus be wholly advisory.

II. THE HOLDING BELOW NEITHER CONFLICTS WITH THE PRIOR DECISIONS OF THIS COURT, NOR CREATES A CONFLICT AMONG THE CIRCUITS, MAKING EVEN PLENARY REVIEW UNNEEDED.

The petition for *certiorari* raises a panoply of federal constitutional questions. This Court lacks jurisdiction to review those questions for the reasons stated above.

Moreover, even in the absence of this fatal jurisdictional defect, none of the issues raised by Petitioner would merit plenary review. The key constitutional rulings by the Sixth Circuit below are consistent with this Court's decisions and do not create a meaningful conflict with the decisions of other circuits.

In fact, all but one of the questions presented for review by Petitioner stem from the failure of Cincinnati to convince the courts below that Section 755 should be assessed solely in light of the Fourth Amendment.[5] Both the district court [Pet. App. 80-84] and the Sixth Circuit [Pet. App. 10-14] correctly refused to measure lengthy periods of administratively imposed banishment with the rational-basis yardstick provided by the Fourth Amendment. In this regard, the courts below hardly adopted a novel approach meriting review on *certiorari*. Rather, the lower courts properly rejected an attempt by the Petitioner to expand the concept of "continuing seizure" beyond any recognized precedent.

This Court has never sanctioned a view of continuing seizure as broad as that proposed by Petitioner. Under the approach advanced by Cincinnati, a person excluded under Chapter 755 from Over-the-Rhine, for either ninety days (for persons merely arrested for a list of designated offences) or one year (for those subsequently convicted of those offences), would be considered "seized" by the state for the duration of his exclusion [Pet. App. 80-81], a scheme Cincinnati claims should be subject only to

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[5] Petitioner also raises a double jeopardy question that the court below expressly declined to reach. [Pet. App. 42]

rational basis review. [Cincinnati Pet. 9]. This exceeds in both its duration and its scope any notion of Fourth Amendment seizure heretofore recognized by this or any other federal appellate tribunal.

In *Albright v. Oliver*, 510 U.S. 266 (1994) (plurality), for example, the Court held that the Fourth Amendment, and not substantive due process, governed claims asserted by a man who, after an arrest warrant issued, surrendered to police, and was subsequently deemed to have been "seized" by the Court. *Id.* at 275. In so holding, the Court opined that the Framers had crafted the Fourth Amendment to address "pretrial deprivations of liberty." *Id.* at 274.

In an effort to construct a conflict among the circuits where none exists, Petitioner attempts to contrast the Sixth Circuit holding below with a number of circuit cases analyzing restrictions on freedom of movement under the Fourth Amendment. [Cincinnati Pet. 6-10]. This argument is transparently flawed. Each of the cited cases applies a Fourth Amendment analysis in the context of pretrial restrictions on liberty intended to secure a subsequent court appearance. *Nieves v. McSweeney*, 241 F.3d 46, 55 (1st Cir. 2001) (holding that an effort to characterize conditions of pretrial release as a Fourth Amendment seizure "stretches the accepted meaning" of the term); *Riley v. Dorton*, 115 F.3d 1159 (4th Cir. 1997) (refusing to extend the concept of Fourth Amendment seizure to cover claims of abuse asserted by pretrial detainees); *Evans v. Bell*, 168 F.3d 856 (5th Cir. 1999) (holding that conditions imposed upon pretrial release, including restrictions on interstate travel and reporting requirements, constituted a Fourth Amendment seizure); *Fontana v. Haskin*, 262 F.3d 871, 879 (9th Cir. 2001) (holding Fourth Amendment

seizure continues after arrest and during transport to police station).

None of these cases conflict with the Sixth Circuit holding below, because each of them addresses pretrial restrictions on liberty, whether by arrest or through the imposition of terms for pretrial release. By contrast, Chapter 755 imposed wholesale restrictions on the freedom to travel in a given area for a fixed duration, all by administrative fiat and not in anticipation of any judicial proceeding, something the circuit court expressly noted below. [Pet. App. 14]. Moreover, nothing in the circuit cases cited by Petitioner supports, even in theory, the notion that a Fourth Amendment seizure can or should be deemed to continue after trial. Chapter 755, by contrast, extended limitations on movement for up to ninety days after an arrestee had left the presence of an arresting officer, even when no charges were pursued. [Pet. App. 108-09]. In short, Chapter 755 is *sui generis*, so unlike the provisions in the cases cited that its invalidation conflicts with none of them.

Likewise, nothing in the Sixth Circuit decision at issue conflicts with the decisions of this Court regarding the outer boundaries of Fourth Amendment seizure. Both *Brower v. County of Inyo*, 489 U.S. 593 (1989), and *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), address the distinct question of when and whether a motorist is seized during the conduct of a high speed chase ending in his death. While *Lewis* also stands for the accepted proposition that a substantive due process analysis should not be applied when a Fourth Amendment claim is available, the degree to which Petitioner's characterization of seizure departs from any known precedent makes clear that this is

not a Fourth Amendment case at all. It was that incongruence that properly led the Sixth Circuit to assess Chapter 755 in light of the Due Process Clause. *Cf. Graham v. Connor*, 490 U.S. 386 (1989).

The holding that there is a right to intrastate travel implicit in the concept of ordered liberty is central to the decisions below [Pet. App. 20-25, 90-97]. The concept is neither novel nor in conflict with the prior holdings of this Court. While the Court has not expressly recognized a right to intrastate travel, neither have its decisions foreclosed the recognition of such a right. At least three Justices of this Court have recently opined that local freedom of movement is deeply rooted within our national heritage.

> [T]he freedom to loiter for innocent purposes is part of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment. We have expressly identified this "right to remove from one place to another according to inclination" as "an attribute of personal liberty" protected by the Constitution.

City of Chicago v. Morales, 527 U.S. 41, 53-54 (1999) (Stevens, J. joined by Souter and Ginsburg, JJ.) (quoting *Williams v. Fears*, 179 U.S. 270, 274 (1900)). In addition to the Sixth Circuit below, the Second Circuit in *King v. New Rochelle Mun. Housing Authority*, 442 F.2d 646, 648 (2d Cir. 1971), and the Third Circuit in *Lutz v. City of York*, 899 F.2d 255, 267-68 (3d Cir. 1990) have expressly recognized

such a right, grounded in the constitutional concept of personal liberty.[6]

Nothing in the decision below with respect to intrastate travel is so novel as to merit plenary review.[7]

Petitioner also contends that *certiorari* should be granted to clarify the degree of constitutional protection that attends grandparental and attorney-client relationships. [Cincinnati Pet. 14-17]. While it is true that both the district court [Pet. App. 84-90] and the Sixth Circuit [Pet. App. 25-32] dealt at some length with the impact of Chapter 755 on associational freedoms, this case presents a poorly framed opportunity for plenary review of those questions. The conclusion that the ordinance burdened these specific relationships was not essential to the holdings below, but rather exemplary of the manifold ways in which Chapter 755 burdened the liberty of the Respondents on a daily basis.

Finally, Petitioner argues that this Court should review the conclusion that Chapter 755 – which imposed an extrajudicial sanction through administrative fiat – violated the constitutional guarantee against double

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[6] *But see Wright v. City of Jackson, Mississippi,* 506 F.2d 900, 902 (5th Cir. 1975) (refusing to find, on the basis of a right to intrastate travel, a "right to commute" in derogation of municipal employment residency requirements.

[7] Petitioner unsuccessfully attempts to create a conflict between the decision below and *Lutz* based on the level of scrutiny applied in each case. The present case involves a total ban on Respondents' ability to travel in an entire urban district. *Lutz,* by contrast, involved a traffic regulation that prohibited cruising on city streets. That distinction is more than sufficient to explain the disparate scrutiny applied by the respective courts.

jeopardy. Such a review is not warranted. First, as noted above, the Sixth Circuit did not ground its opinion on double jeopardy at all, holding that the other defects in Chapter 755 were sufficient to seal its constitutional fate. *See* n.5, *supra.* The district court did find that Chapter 755 violated Respondent Au France's right to be free from double jeopardy. [Pet. App. 63-70]. It did so, however, through the systematic and routine application of the seven part test set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). This fact intensive application of accepted precedent does not merit plenary review by this Court.

CONCLUSION

Both because an intervening decision of the Ohio Supreme Court would render any decision by this Court advisory, and because plenary review is unwarranted, the Petition for Certiorari should be denied.

Dated: May 5, 2003

Respectfully submitted,

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